IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 97 OF 2004

1. Mr. Adolf Olegario
   Nazareth, son of
   late Caetano Olegario
   Nazareth, major,
   married, businessman
   and his wife,

2. Mrs. Zarina Olegario
   Nazareth, service

3. Mrs. Alice Olegario
   Nazareth, widow of
   late Caetano Olegario
   Nazareth, all residing
   at Punola, Ucassaim,
   Bardez Goa.

4. Dr. Anthony Olegario
   Nazareth, son of Caetano
   Olegario Nazareth,
   Paediatrician and his wife.

5. Mrs. Alcina Olegario
   Nazareth, both residing
   at Gaunsawaddo, Mapusa
   Bardez Goa.

6. Dr. Fatima Olegario
   Nazareth e Rodrigues,
   daughter of late Caetano
   Olegario Nazareth and
   her husband,

7. Dr. Nicolas Rodrigues,
both residing at Muscat,
Jabic Ship, P.O.Box 720,
C.P.O., Serb, Post Code
No.111, Sultanate
of Oman.

8. Miss Norma Olegario
Nazareth, daughter of
late Caetano Olegario
Nazareth, residing at
Punela Ucassaim,
Bardez Goa. ... Appellants

versus

1. Mrs. Maria Albertina
de Souza, widow of
late Antonio Joao
Justiniano de Souza,
landlady,

2. Mr. Anthony Joseph
Joaquim de Souza,
son of late Antonio
Joao Justiniano de
Souza, major, landlord,
Both residents of B/3
Triobara Apartments,
Opp. Cinema El Dourado,
Panaji Goa. ... Respondents

Mr. V. Menezes, Advocate for the Appellants.

Mr. R. G. Ramani, Advocate for the Respondents.

CORAM : N. A. BRITTO, J.

DATE : 23RD JUNE, 2006.

ORAL JUDGMENT

This is defendants' second appeal arising from R.C.S. No.19/96/E.

2. Heard the learned Counsel on behalf of both the parties. The parties hereto shall be referred to in the names as they appear in the cause title of the said Civil Suit.

3. The plaintiffs' suit for declaration that they are absolute owners in exclusive lawful possession of the suit property/passage, for mandatory and permanent injunctions came to be decreed by the trial Court by Judgment/Decree dated 10-4-2003. The counterclaim filed by the defendants came to be dismissed. The plaintiffs carried an appeal to the District Court which again came to be dismissed by Judgment dated 9-7-2004. The plaintiffs have now filed this second appeal which was admitted by Order of this Court dated 30-6-2005 on

two questions, as substantial questions of law, to which reference will be made, hereinafter.

4. The dispute between the plaintiffs and the defendants was regarding a strip of land, referred to as a passage admeasuring about 35 sq. meters lying on the eastern side of the property of the plaintiffs known as "Punola" admeasuring 560.50 sq. meters and surveyed under No.20/2. In fact, the said strip has been surveyed not as part of survey no.20/2 but as part of survey no.20/1 belonging to the defendants. There is no dispute that the property of the plaintiffs which is surveyed under no. 20/2 abuts on a public road on the northern side while it is bounded on the western, southern and eastern sides by the property of the defendants. The plaintiffs claimed that the said strip which was surveyed as part of survey no.20/1 was part and parcel of their property Punola, purchased by the husband of plaintiff no.1 by Deed dated 31-8-1936 admeasuring 560.50 sq. meters and the said strip was wrongly surveyed, in view of their absence, in the name of the defendant/s.

5. The case of the defendants, on the other hand, was

that they were the owners in possession of the said strip. The defendants also claimed positive prescription in relation to the same.

6. The plaintiffs produced their title deed and examined 3 witnesses including a neighbour and a surveyor. The defendants did not produce their title deed but also examined 3 witnesses including DW2 who was none other then the brother of defendant no.1. Both the Courts below have placed reliance on the evidence produced by the plaintiffs, in preference to the evidence produced by the defendants, and in my view rightly, to come to the conclusion that the said strip was part and parcel of the property of the plaintiffs and was in their possession and was not in possession of the defendants. These are but concurrent findings of fact rendered by both the Courts below.

7. That takes us to the substantial questions framed by this Court on 30-6-2005. I will take the second question first:

> "Whether the decrees of the Courts below, dismissing the appellants counterclaim are bad in law since they are based on

> an erroneous notion of law that a plea of positive prescription under Article 505 of the Civil Code, 1867 infers adverse possession against the respondents".

8. The contention of Mr. V. Menezes, the learned Counsel of the defendants is that both the Courts below have misunderstood the concept of Article 505 of the Code and that it was not at all necessary to claim positive prescription that the person claiming positive prescription was required to be in hostile or adverse possession.

9. Mr. R. G. Ramani, the learned Counsel on behalf of the plaintiffs, has submitted that this question does not at all arise. I am entirely in agreement with the learned Counsel on behalf of the plaintiffs. It is to be noted that the plaintiffs had claimed the disputed strip as part of their property and had also claimed that they were in possession of the same. The plaintiffs had proved through the evidence of the witnesses examined by them, which has been accepted by both the Courts below, that the plaintiffs had constructed a septic tank therein in the year 1968 and had also a plantation and were using the said strip as

a passage to go to and fro from the said main road to their back door existing on the eastern side of their property. Both the Courts below have come to the conclusion, also relying on the evidence of PW3/Prazeres Gonsalves, who was a surveyor, that the disputed strip was part and parcel of the property claimed by the plaintiffs and was in their possession. The defendants did not produce any title document. The corollary of that finding is that the defendants were not in possession of the same and which conclusion in fact was sufficient to defeat their claim that they were either the owners of the said property or were owners thereof by way of positive prescription. Only because the learned F.A.C.(first appellate Court) had made an observation that in every prescription there was an element of adverse possession, would not make this question as a substantial question of law arising between the parties. What is a substantial question of law has now been explained by the Supreme Court in para 14 in the case of **Santosh Hazari** v. **Purshottam Tiwari** ((2001) 3 SCC 179). The Supreme Court has again observed in the case of **Gurudev Kaur and others** v. **Kaki and others** (2006 AIR SCW 2404) and has stated therein that the rationale behind allowing a second appeal on a question of law is, there ought to be some

Tribunal having a jurisdiction that will enable it to maintain, and, where necessary, re-establish uniformity throughout the State on important legal issues so that within the area of the State, the law, in so far as it is not enacted law should be laid down, or capable of being laid down, by one Court whose rulings will be binding on all Courts, Tribunals and authorities within the area over which it has jurisdiction. This is implicit in any legal system where the higher Courts have authority to make binding decisions on question of law. The Apex Court has also referred to a number of Judgments of that Court and further observed that despite repeated declarations of law by the Judgments of that Court and the Privy Council for over a century, still the scope of Section 100 has not been correctly appreciated and applied by the High Courts in a large number of cases. As already stated, both the Courts below have clearly come to the conclusion based on the evidence led by the plaintiffs that it is the plaintiffs who were using and in possession of the disputed passage as part and parcel of their property purchased by Deed dated 31-8-1936. The corollary of that was that the defendants were not in possession of the said disputed portion and, therefore, could not have proved any

positive prescription simpliciter. The defendants had otherwise not proved title to the same as well. Looked at from whatever angle, this question does not arise between the parties as substantial questions of law.

10. That takes us to the first question which reads as follows:-

> "Whether the suit, which was for declaration of ownership, ought to have been dismissed for non-joinder of Jenifer de Souza, divorced wife of the Respondent No.2, as a necessary party, in the light of the fact that the suit property was allotted exclusively to her by decree of divorce dated 30th October, 1996".

11. Admittedly, the property was purchased by the husband of plaintiff no.1. Plaintiff No.1 and her deceased husband had one son - plaintiff no.2 and one daughter by name Elizabeth. Elizabeth was married. The said Elizabeth and her husband had executed a Deed of Renunciation of the assets left behind by their deceased father/father-in-law and there is no

grievance made now that the suit was bad for their non joinder. The only grievance made is regarding the non joinder of Jennifer, the divorced wife of plaintiff no.2. Plaintiff No.2 was married to Jennifer and they were separated by a Decree of Divorce dated 30-10-1996. Their marriage was dissolved by Civil Judge, Senior Division and in Matrimonial Case No.1/95(Port) published on Gazette dated 9th January, 1997. The defendants had taken a plea that the suit as framed by the plaintiffs was bad for non joinder of the said Jennifer and was liable to be dismissed. The learned trial Court held that "the said parties are not interested in the adjudication between the plaintiffs and the defendants ... and it also cannot be said that the result of the proceedings would affect the said parties and they were not necessary to the constitution of the suit. Before the F.A.C. the plaintiffs filed an application dated 18-6-2004 and produced a Decree in the said Matrimonial Case No.1/95(Port). The said Decree showed that certain properties were allotted to plaintiff no.2(the husband) and others were allotted to the wife(the said Jennifer). Under item no.B(Ann.II) what is referred to is a plot of land in the village Punola, Uccassaim, Bardez. This substantial question has been based on certain observations of

the learned F.A.C. in para 15 of the Judgment. The learned F.A.C. referred to the said consent decree and observed that the said decree showed that the divorced wife(Jennifer) had a share in the suit property and then referred to the Judgment of this Court in the case of **Smt. Maria Tecla Goes Pereira** v. **Shri Denzyl Lobo and another**(1993(1) Bom.C.R. 679) and concluded that the suit would not fail in the absence of the wife of plaintiff no.2 as a party to the suit. On behalf of the defendants, reliance has been placed on the case of **Kanakarathanammal** v. **V. S. Loganatha Mudaliar and another** (AIR 1965 SC 271) and it is submitted that in the absence of the wife of plaintiff no.2 no effective declaration as prayed for by the plaintiff could have been made. Reference was also made to the same decision reported in **Smt. Maria Tecla Goes Pereira** v. **Shri Denzyl Lobo**(supra). Both these Judgments are sought to be distinguished on behalf of the plaintiffs by Mr. R. G. Ramani, the learned Counsel for the plaintiffs. It is not necessary to enter into this controversy. It is fairly well settled that in a suit for declaration of title all the co-owners or co-heirs are required to be made parties to the suit. However this principle had no application to the facts of this case. It is to be noted that the

plaintiffs' suit was not merely for a declaration but also for permanent and mandatory injunctions. Firstly, it must be observed that the plaintiffs having been shown to be the co-owners of the property were certainly entitled as co-owners to maintain a suit for permanent and mandatory injunctions against the defendants who had no better title than the plaintiffs. Secondly, it must be observed that the plaintiffs had produced the said consent decree to show that the plaintiff no.2 and his spouse were separated in person as well as in properties although the plaintiffs might have not stated the same in so many words in their application. The allotment of the properties in favour of plaintiff no.2 and his divorced wife Jennifer were shown in Annexure 1 and Annexure 2 to the said Deed respectively. True, one of the properties allotted to her bore the same name as that of the suit property. However, it was not the case of the defendants that the suit property was allotted to Jennifer, the divorced wife of plaintiff no.2. If that was so, the suit itself would have been rendered infructuous. In fact, it has been submitted by Mr. Ramani that the property which is allotted to the divorced wife of plaintiff no.2 is also Punola but surveyed under no.2/19 situated in the same village of Punola in

the parish of Ucassaim and admeasures 675 sq. meters. In my view, based on the said consent decree the learned first appellate Court could not have arrived at a conclusion that the divorced wife of plaintiff no.2 had a share in the suit property and, therefore, was a necessary party to the suit and looked from that angle this question also does not arise, as substantial question of law. Plaintiffs had proved that they were the exclusive owners and therefore entitled for the declaration sought for by them.

12. In the light of the above, I find there is no merit in this second appeal. Both the Courts below have come to the conclusion that it is the plaintiffs who have been in possession of the disputed strip as part and parcel of the property belonging to the plaintiffs purchased vide Deed dated 31-8-1936. The appeal is, therefore, hereby dismissed with costs to the plaintiffs by the defendants, throughout.

N. A. BRITTO, J.

RD